With regard to No. 4, however, there is a much closer association with No. 1. The documentary evidence shows him to take a very active part in the business of No. 1. But does it show an actual knowledge of what was going on. The fact that the chandu is found in the house wherein he resides, of which he is the ostensible tenant tends to show a potential physical control over that illicit chandu, but that he knew it was there is a matter of inference, and though there is ample evidence of knowledge of importation of goods, is it possible from his knowledge of the money transmitted to China to draw the inference that he knew all about what was hidden in the imported goods. In my opinion, having regard to the fundamental rule that the prosecution must prove the case beyond reasonable doubt, I find it unsafe to come to such a conclusion. This has been a hit or miss sort of prosecution and no doubt the conduct of the appellants gives rise to the suspicion that the appellants were concerned in the importation, but that is not proof.

With regard to No. 4 accused it has however been suggested that even if the conviction for possession under section 11 is quashed, this Court may substitute a verdict of being concerned in the importation under section 12. While section 310 of the Criminal Procedure Code empowers this Court to alter a finding, I think that combined effect of sections 176 and 177 of the Criminal Procedure Code do not allow me to alter the finding in the present case. But even if they did, it is quite clear that the appellant (No. 1 accused) ought to have an opportunity of pleading to such a charge, for the facts which could support it may be vastly different from those which would support a charge of possession under section 11 and moreover he might quite well have an answer to it. I am not however to be taken as deciding that the prosecution cannot bring a charge under section 12 against No. 4 accused.

The appeals are allowed and the convictions quashed.

Appeal allowed.

Solicitors for Appellants Nos. 1 & 3—
Allen & Gledhill.

Solicitors for Appellants No. 2—
Chan & Eber.

[APPELLATE CRIMINAL JURISDICTION]

HOWES, J.

September 12, 1938.

REX v. TAN HOAY.

[PENANG MAGISTRATE'S APPEAL No. 28 of 1938]

Chandu Revenue Ordinance, S. 11 (3) (d) —Proof of mens rea unnecessary.

Section 11 (3) (d) of the Chandu Revenue Ordinance imposes an absolute prohibition by law of the possession custody or control of non-Government chandu. The usual presumption that *mens rea* is an essential ingredient of every offence is displaced by the express wording of the section. Excepting in cases such as this, in order to constitute an offence there must in general be guilty knowledge on the part of the accused person or his agent.

MAGISTRATE'S APPEAL.

B. E. Ross, for the Appellant.

T. D. Hughes, Crown Counsel, for the Crown.

Cur. Ad. Vult.

HOWES, J.—In this case the Appellant was convicted under Section 11 (3) (d) of Chapter 223 (Chandu Revenue Ordinance) of having in her possession chandu other than Government chandu. The subsection reads: "No person shall, except as permitted by this Ordinance or by any rules made thereunder—

> (d) have in his possession, custody or control any chandu other than Government chandu."

It will be noted that in this subsection there is no question of "knowingly," or any other qualifying attribute to the having in possession, custody or control. It is an absolute prohibition by the legislature, such as occurs in several statutes of this nature, where revenue or excise is concerned.

This point was considered by Mr. Justice Wright in the case of *Sherras* v. *De Rutzen* (1895, 1 Q.B. at page 921) where he said. "There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered."

As I have already said, the Section is prohibitive: "No person shall have in his possession, custody or control." If qualifying words such as "knowingly" or "intentionally" were included, then the prosecution would have to prove knowledge or intention on the part of the accused.

Consequently, once the possession, custody or control of the chandu was proved (or as in this case, admitted), the onus of proof shifted, and it becomes the duty of the appellant to satisfy the learned District Judge that such possession was innocent. This was the only issue which he had to try.

The chandu was found concealed under a lot of clothing in a box belonging to the Appellant. Her explanation was that her daughter (a child of about 13) had picked up a bundle which contained 15 packets of non-Government chandu from a dustbin, and that she (Appellant) never saw the parcel till the Revenue Officers found them in her box.

The child, in her evidence, said the tins of chandu were in one big bundle which she found in a dustbin. She untied the parcel, and saw a number of packages like Exhibits Cl-15 and "thought the parcel might contain playthings." She told her mother she had found something in a dustbin, and her mother said: "Don't bring in rubbish." She took the parcel upstairs and put it in her mother's box.

In the child's statement to the Assistant Superintendent of Excise, made immediately after the raid, she said: "I took them (the packets) home and asked my mother what the packets contained, but my mother did not know. My mother told me to put the packets in the wooden box."

The District Judge in his Grounds of Decision dealt at great length with the improbabilities of this story, which I think are obvious to anyone reading the record.

The story sounds to me so improbable that even though I have not had the advantage of seeing the witnesses, I accept without any hesitation the District Judge's finding that the whole story was false. This was the best explanation the accused could offer, to account for the presence of this chandu in her box.

She failed completely to convince the District Judge that her possession was innocent; and, as I have said, this was a question of fact for the learned District Judge to decide, and one with which I can see no possible grounds for interfering. The appeal must, therefore, be dismissed.

As regards the sentence, since the penalty allowed by this Ordinance is 3 years rigorous imprisonment, it seems to me that the District Judge was lenient in imposing the imprisonment of 8 months simple imprisonment only, having regard to the quantity and value of the chandu seized.

Appeal dismissed.

[APPELLATE CRIMINAL JURISDICTION]

McELWAINE, C.J.

September 24, 1938.

REX v. M. SIVAPRAKASAM & ANOTHER.

[MALACCA CRIMINAL APPEAL No. 7 of 1938]

Liquors Revenue Ordinance (Cap. 225), s. 57 —Restriction on Sale of Toddy.

When an accused is charged with selling toddy without a licence the onus of proving the existence or non-existence of a licence rests upon the person licensed not upon the Crown.

MAGISTRATE'S APPEAL.

Storr, Crown Counsel for the Crown.

Goho for appellants.

The facts and arguments appear sufficiently from the judgment.

Cur. Ad. Vult.

McELWAINE, C.J.—This is an appeal by the second appellant from a conviction for selling toddy without a licence, and by the first appellant from a conviction for abetment of the offence of the second appellant.

The case was under section 57 of the Liquors Revenue Ordinance (Chapter 225).

The first ground of appeal was that the onus was on the Crown to prove that there was no licence and that no evidence to this effect was tendered. Although this ground of appeal was abandoned *in limine* by Mr. Goho, it is desirable to say a word about it having regard to the old local case and *Rex* v. *Green*, (1888) 4 Ky. 401, (1888) 1 S.L.J. 53.

Section 57 enacts that "no person, other than a person in whom the exclusive right mentioned in section 55 is vested or a person licenced under section 51(2), shall sell or offer for sale or permit to be sold or offered for sale any toddy."

The section is prohibitory subject to two exceptions.

R. v. *Green* (*supra*) is the same case as that which is twice and somewhat differently digested in paragraphs 973 and 974 of Dr. Withers Payne's Malayan Digest, under the name of *Green* v. *Govinda* and *R.* v. *Green*. Paragraph 974 appears to me to be the more accurate. The section applicable in *Green's* case was very differently worded to the section before me, and in any case Wood, J. said "I do not decide the question on whom is the *onus probandi* of proving the non-existence of a licence; I entertain doubts whether it does not lie on the prosecution on the authority of the *Municipal Commissioners* v. *Chuah Seng*, (3 Ky. 140), but I am not quite satisfied with that case." *Chuah Seng's* case was decided before section 106 of the Evidence Ordinance was enacted, but it is also at variance with the note in *Stone's* Justices Manual at p. 1030 "The burden of proof that a house is licensed rests on the